HAB

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: DEC 11 1980

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

CITY OF NEWPORT ET AL. *v.* FACT CONCERTS, INC. AND MARVIN LERMAN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80-396. Decided December —, 1980

+ cf.!

JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, dissenting.

I dissent from the denial of certiorari by the Court to review the first question presented by petitioners:

> "Is a Municipality liable for punitive damages in a § 1983 case?" Pet., I.

As both the District Court and the Court of Appeals for the First Circuit noted, petitioners made no objection to the District Court's instructing the jury that the city of Newport might be liable for punitive damages. Rule 51 of the Federal Rules of Civil Procedure provides in pertinent part that "no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Thus, if the District Court had refused to consider the issue of punitive damages on the merits in its decision denying the motion for judgment n. o. v., the Court of Appeals could quite properly have affirmed on that ground and petitioners would have no properly presented federal question with respect to punitive damages in their petition to this Court. But that is not what happened here.

The District Court, in its opinion, stated:

> "Although the policies of fairness and economy which Rule 51 incorporates are vital . . . , this Court does not rest its decision on this procedural ground alone. Defendants' substantive legal argument do not constitute a

sufficient basis for granting a motion for judgment n. o. v." Pet., App. B–3.

The court then went on to consider whether 42 U. S. C. § 1983 authorized the imposition of punitive damages on municipal corporations, and concluded that it did. It also found, however, that "[a]lthough a municipality may be held liable for punitive damages, an analysis of the facts of this case convince this Court that the punitive award of $200,000 against the City of Newport is excessive, against the weight of the evidence, and fails to comport with substantial justice." Pet. App. B–10.

On appeal, the Court of Appeals for the First Circuit also noted the failure of petitioners to object to the punitive damage instruction, but went on to say, "We may overlook a failure of this nature, *Williams* v. *City of New York*, 508 F. 2d 356, 362 (2d Cir. 1974). . . ." The Court then noted:

> "[I]t is by no means certain that the Court's instructions constituted error. This is an area of the law in which there has been and apparently still is, considerable movement. . . . Although the Supreme Court has never fully addressed the question, it has edged toward a similar conclusion. *Carlson* v. *Green*, 48 U. S. L. W. 4425, 4427 (April 18, 1980) (*dictum*); *Carey* v. *Pihus*, 435 U. S. 247, 254–55, n. 11 (1978). When our rule on this point is viewed in light of the Supreme Court's determination that municipalities are 'persons' within the ambit of § 1983, *Monell* v. *New York City Department of Social Services*, 436 U. S. 658 (1978), there arises a distinct possibility that municipalities, like all other persons subject to suit under § 1983, may be liable for punitive damages in the proper circumstances. There certainly is no imposing body of law to the contrary.
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> "In short, the present state of the law as to municipal liability is such that we cannot with confidence predict its future course. . . ." Pet. App. A, 14–15.

I would have thought that the very statements just recited from the opinion of the Court of Appeals about the uncer-

tainty of the law in this area and the lack of any express decision from this Court on the point would counsel a grant of certiorari to resolve it. While the question which petitioner seeks to present could have been mooted by a simple reliance upon Rule 51's proscription against objections to instructions which were not made prior to the charge to the jury, the fact is that both the District Court and the Court of Appeals discussed the legal issue as to the availability of punitive damages in a § 1983 action on its merits. As with our treatment of petitions for review from a judgment of the highest court of a State, if that court chooses to decide a federal question on the merits, even though it might have refused to pass upon it at all because not raised at the earliest possible opportunity, we have authority to review its decision of the federal question. *Hulbert* v *City of Chicago*, 202 U. S. 275 (1906). Here, an important question of federal law has been decided on the merits by the Court of Appeals for the First Circuit in a manner which *that* court concedes may or may not be consistent with prior decisions of this Court I would grant the petition for certiorari as to Question No 1 in order to resolve the issue as to the availability of punitive damages.